

In the Matter of)
)
Application of Connecticut Public Broadcasting,) LMS File No. 0000036047
Inc. to Convert to DTS Operation)

Released: August 11, 2020

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1, 2017, WEDW commenced channel sharing with WZME(TV) on the built-out Trumbull Tower.⁸ CPBI subsequently filed an application for a construction permit (Stamford Modification Application) to move that channel *21 facility southwest to a tower located near Stamford, Connecticut (the Stamford Tower).⁹ That second permit to construct in Stamford was granted on December 1, 2017 (*Stamford Modification Grant*), was never appealed, and is therefore final.

4. *DTS Letter Order*. On December 6, 2017, CPBI filed an Application for Modification of a Construction Permit to Convert from DTV to DTS (DTS Application) which proposed to modify the construction permit for the Stamford Tower. CPBI proposed that the Stamford Tower serve as WEDW's DTS reference point, with the Trumbull Tower as DTS Site 1 and the Empire State Building as DTS Site 2. The reference point provides a location that a DTS station can use to determine that requisite coverage will occur when applying the table of distances calculations in section 73.626(c) and (d) of the Commission's rules to DTS Sites 1 and 2, which are the locations of the DTS station's actual transmitters.¹⁰ Thus, pursuant to the DTS Application, no transmitter would be constructed at the Stamford Tower. In the *DTS Letter Order*, the Division granted the DTS Application, and rejected all three arguments raised in the informal objection to the DTS Application filed by PMCM.

5. First, the Division disagreed with PMCM's argument that the DTS Application was defective pursuant to section 73.626(c)(2) of the Commission's rules, which states that "a station's DTS reference point is established in the FCC Order that created or made final modifications to the Post-Transition DTV Table of Allotments" in section 73.622(i). The 2008 *DTS R&O* established that a station's DTS reference point, which is used to calculate the maximum service area that can be obtained by DTV stations under the rules using the Table of Distances, would be determined using a station's final allotment in the Post-Transition Table of DTV Allotments.¹¹ As the Commission explained, "[g]enerally, a station would use its current reference point based on its [] facility [as set forth in the Post-Transition DTV Table of Allotments, §73.622(i)], or the Order granting it a new channel, as appropriate."¹² The Commission noted, however, that "upon the appropriate public interest showing, a station may request a change in its reference point, just as stations have done historically, providing certain criteria are met. Such changes in reference points are subject to a station showing that the resulting service area circle fully encompasses the station's authorized service area."¹³

6. According to PMCM, WEDW's DTS reference point pursuant to section 73.626(c)(2) would therefore necessarily be the Trumbull Tower near Bridgeport because that was the point established by the Commission in the Post-Transition DTV Table of Allotments.¹⁴ Instead, the Division agreed with CPBI that under section 73.626(c)(2), the Stamford Tower could be used as WEDW's reference point in evaluating the DTS Application, based upon the 2008 *DTS R&O* public interest guidance noted above.¹⁵ The *DTS Letter Order* further explained that the Division has routinely permitted stations to change their reference point through the filing and grant of a minor modification application, such as the DTS Application. The *DTS Letter Order* then found that changing WEDW's reference point serves the public interest because it would permit WEDW to place a transmitter on the Empire State

⁸ LMS File No. 0000029677

⁹ *Id.* at 2-3 (citing LMS File No. 0000034869). That application was unopposed.

¹⁰ 47 CFR §§ 73.626(c) and (d).

¹¹ *DTS R&O* at 16748-49, para. 29.

¹² *Id.*

¹³ *Id.*

¹⁴ *DTS Letter Order* at 3, 5.

¹⁵ *Id.* at 5 (citing *DTS R&O*, 23 FCC Rcd at 16748-49, para. 29).

Building, which would eliminate interference to WEDW from WDVb-CD;¹⁶ preserve service to all of WZME's existing viewers while extending CPBI service into Western Connecticut; and make service available to viewers in Connecticut that point their antennas at New York City, where most of the market's other television stations' transmission facilities are located.¹⁷

7. Second, the Division found that the DTS Application was fully compliant with the Commission's DTS application requirements in section 73.626(f)¹⁸ and disagreed with PMCM's claim that the DTS Application was similar to a prior unsuccessful application filed by WEDW's channel sharee. That prior application was filed in 2008, prior to the adoption of the *DTS R&O*, by the predecessor to WZME, WSAH, seeking to relocate that station's transmitter to the Empire State Building, but the Division dismissed that request based on a finding that doing so would create a significant loss of service to viewers in Connecticut as well as an effective reallocation of the station to New York City.¹⁹ The *DTS Letter Order* explained that this is a false equivalency because the DTS option was not available to the licensee of WSAH when it filed its minor modification application back in 2008. Now, however, the DTS rules and technology permit CPBI to operate multiple synchronized transmitters so "there will be no service loss since DTS Site 1, located outside Bridgeport at WEDW's currently licensed transmission site [i.e., the Trumbull Tower], will continue to place a signal over its existing geographic service area."²⁰

8. Third, the Division determined that, pursuant to section 73.633(f)(5) of the rules, CPBI was indeed allowed to upgrade its facility to match the coverage area of the facilities specified in a construction permit issued to WABC-TV, even though that permit had expired while the DTS Application was pending.²¹ This rule, which was meant to equalize coverage between VHF and UHF stations, permits a station to exceed the permitted ERP and antenna HAAT in order to provide the same geographic coverage area as the "largest station" within their market.²² In the *DTS R&O*, the Commission determined that "[a]s an alternative to the Table of Distances Approach for determining the hypothetically maximized service area, full-power stations may use the 'largest station' provision in section 73.622(f)(5) of the rules."²³ The Commission concluded that "DTS stations may obtain the same coverage under the rule as would a single-transmitter station, provided the DTS service would not result in new interference."²⁴

9. In the *DTS Letter Order*, the Division rejected PMCM's argument regarding the insufficiency of WABC-TV's expired permit for purposes of applying the "largest station" provision in section 73.622(f)(5) of the rules and noted that the Media Bureau has routinely granted applications seeking to match the largest station in the market based on construction permits, and that the Commission

¹⁶ WDVb-CD was repacked from channel 23 to channel 22. According to CPBI, the same day it applied for the Stamford permit on channel *21 to improve CPBI service to western Connecticut, the licensee of WDVb-CD filed a maximization application which would have caused interference to WEDW's proposed facility, especially in the underserved area to which WEDW was seeking to expand. *DTS Letter Order* at 4 n.20; CPBI Response to Informal Objection, LMS File No. 0000036047 at 11 (CPBI Response). CPBI explained that when it determined that the DTS Application with a transmitter site co-located with WDVb-CD on the Empire State Building would eliminate the interference, technical limitations in the Commission's Licensing and Management System (LMS) precluded CPBI from filing to convert WEDW's existing licensed facility to a DTS. Accordingly, it filed an application to convert its Stamford construction permit to DTS. *Id.*

¹⁷ *Id.*

¹⁸ 47 CFR § 73.626(f) (coverage requirements for DTS transmitters)

¹⁹ *DTS Letter Order* at 4 n.20 (citations omitted).

²⁰ *Id.*

²¹ *Id.* at 5-6.

²² 47 CFR 73.622(f)(5).

²³ *DTS R&O*, 23 FCC Red at 16751-52, para. 35.

²⁴ *Id.*

evaluates applications based on whether they complied with the rules at the time they were filed.²⁵ The *DTS Letter Order* also noted that even if CPBI could not match the area from WABC-TV's expired permit, WJLP, Middletown Township, New Jersey, licensed to PMCM, was the largest station in the market at the time of the release of that decision, and that both of CPBI's DTS sites were located within the 116.4 kilometer DTS arc of WJLP, and thus the DTS Application would still be rule compliant.²⁶

10. *Pleadings.* In the AFR, PMCM sets forth three factors that it believes warrant reversal of the *DTS Letter Order*. First, it argues that the DTS Application relied on the wrong reference point by identifying the Stamford Tower as the reference point rather than the Trumbull Tower, which is the site specified in the Table of Allotments.²⁷ According to PMCM, the Division's determination that use of the Stamford Tower as the reference was in the public interest was faulty both procedurally because CPBI never actually requested a change in its reference point from its original location, the Trumbull Tower, until CPBI replied to PMCM's objection, and substantively because use of the Stamford reference point would not "fully encompasses the station's authorized service area," as required by the *2008 DTS Order*.²⁸ Second, PMCM claims that permitting CPBI to "match" the proposed coverage area of WABC-TV's construction permit does not square with the plain language or intent of section 73.622(f) because it was just a permit to build rather than an actual service area and because the construction permit expired while the DTS Application was pending.²⁹ Third, PMCM argues that grant of the DTS Application endorses an abuse of the Commission's processes by effectively allowing commercial station WZME, which unsuccessfully sought to relocate its transmitter to the Empire State Building in 2008, to dictate the service area of its noncommercial sharing partner and deprive service to over 2 million people in Connecticut.³⁰ PMCM alleges that the service area of WEDW, a non-commercial station, is being dictated by WZME, its commercial sharee, and that the DTS Application is effectively mirrors the rejected site change application previously filed by WZME's predecessor in 2008.³¹

11. In its Opposition, CPBI responds that the grant of WEDW's Stamford Modification Application was the functional equivalent of an "Order granting it a new channel"³² and, therefore, it was entitled to use the site identified in that application as a DTS reference point pursuant to the terms of the *2008 DTS Order*.³³ Alternatively, CPBI argues that the Division found that allowing WEDW to change its reference point was in the public interest.³⁴ Next, CPBI asserts that its reliance on the WABC-TV construction permit for its proposed DTS contour was proper and consistent with the rules, regardless of that permit's expiration prior to the grant of the DTS Application.³⁵ Lastly, the Opposition argues that the Division correctly distinguished the previous unsuccessful attempt to relocate WSAH's transmitter to the

²⁵ *DTS Letter Order* at 6.

²⁶ *Id.*

²⁷ AFR at 4-6.

²⁸ *Id.* at 4-5 (quoting *DTS R&O*, 23 FCC Rcd at 16751-16752, para. 35).

²⁹ *Id.* at 6-8. The facility authorized in the *Stamford Modification Grant* was never constructed and the construction permit expired on its own terms on August 2, 2019, shortly after the AFR was filed.

³⁰ *Id.* at 8-10.

³¹ See AFR at 8-10; see *supra* para. 7

³² The *DTS Letter Order* did not rely on the argument that the *Stamford Modification Grant* was the functional equivalent of an "order granting [WEDW] a new channel" and we do not rely on this reasoning here.

³³ CPBI Opposition at 6-9 (quoting *DTS R&O*, 23 FCC Rcd at 16748-49, para. 29).

³⁴ *Id.*

³⁵ *Id.* at 10-12.

Empire State Building since CPBI in this instance will preserve service to all of WEDW's existing viewers.³⁶

12. In its Reply, PMCM reiterates that WEDW's site change authorized in the *Stamford Modification Grant* cannot be considered an "Order granting it a new channel" pursuant to the terms of the *2008 DTS Order*;³⁷ that CPBI cannot use the non-existent coverage area of a construction permit that was never built-out and has since expired as a DTS coverage match;³⁸ and that allowing CPBI to use the coverage gap-filling provisions of the DTS process to allow WEDW's channel-sharing partner to creep closer to a big metropolitan area undermines section 307(b) of the Communications Act of 1934, as amended (Act).³⁹

II. DISCUSSION

13. The Commission will grant an application for review of a final action taken on delegated authority only when such action, *inter alia*, conflicts with statute, regulation, precedent or established Commission policy; involves application of a precedent or policy that should be overturned; or makes an erroneous finding as to an important or material factual question.⁴⁰ Because we uphold the Division's findings, we deny the AFR.

14. First, we reject PMCM's arguments regarding the Division's determination to authorize a change in reference point to Stamford. While the Commission's rules establish the Trumbull Tower as the reference point for evaluating the DTS Application, the Commission in the *2008 DTS Order* explained that "upon the appropriate public interest showing, a station may request a change in its reference point."⁴¹ We affirm the Bureau's decision that using the Stamford site as the reference point for the DTS Application serves the public interest.⁴² While CPBI did not put forth a public interest showing in the DTS Application, it did offer public interest justifications for this reference point in response to PMCM's challenge to the DTS Application, as PMCM concedes.⁴³ We find that the Division appropriately made the necessary public interest finding to support a change in reference point, including finding that a grant of the DTS Application would eliminate interference, preserve service to existing viewers while also extending service, and make service available to viewers that point their antennas at

³⁶ *Id.* at 13-14.

³⁷ Reply at 1-3. As noted above, the *DTS Letter Order* did not rely on the argument that the *Stamford Modification Grant* was the functional equivalent of an "order granting [WEDW] a new channel" and we do not rely on this reasoning here.

³⁸ *Id.* at 3-4.

³⁹ *Id.* at 4-5; 47 U.S.C. § 307(b).

⁴⁰ See 47 CFR § 1.115.

⁴¹ *DTS R&O*, 23 FCC Rcd at 16748-49, para. 29.

⁴² AFR at 4-5 (claiming that the Trumbull Tower, rather than the "phantom" Stamford site, for which CPBI obtained a construction permit but never built out, should be used as the reference point). Because we conclude that using the Stamford site as the reference point for the DTS Application serves the public interest, we need not address whether the Bureau's grant of CPBI's application to move its transmission facilities to the Stamford Tower was an "Order granting it a new channel" pursuant to the terms of the *2008 DTS Order*. CPBI Opposition at 6-9 (quoting *DTS R&O*, 23 FCC Rcd at 16748-49, para. 29).

⁴³ *Id.* Nothing in the *2008 DTS Order* provides that the public interest showing can only be set forth in the DTS application rather than in response to an objection. However, we encourage future applicants to set forth their public interest showing in the initial application. Indeed, in the case of an unchallenged application, failure to include a public interest showing in the initial application would hinder the Commission's ability to make the requisite public interest finding.

New York City, where most of the market's other television stations' transmission facilities are located.⁴⁴ While we acknowledge that CPBI has not built out the Stamford site, we do not believe it would have been a wise use of resources to have required CPBI to first build a new transmitter at the Stamford site prior to filing the DTS Application, especially during the Incentive Auction repack, when equipment and construction resources are limited.

15. We find PMCM's broad-ranging argument that the Stamford Modification Application was "bogus" because CPBI never had any intention of constructing or operating from the Stamford site, in violation of its build-out obligations, to be unfounded.⁴⁵ As an initial matter, any challenge to the validity of the grant of the Stamford Modification Application or request for rescission should be directed to the grant of that application.⁴⁶ In any event, with regard to the instant DTS Application, nothing in the record before us gives rise to any indication of bad faith on CPBI's part, and PMCM does not introduce any evidence to support its allegation. We impress upon all new licensees their obligations to build out without delay, but there is no requirement to continue to do so where a licensee files for a modification. Licensees often seek to make adjustments throughout the course of their operation, and the filing of a modification application—such as the DTS Application—standing alone does not create a showing or even inference of bad intent or gamesmanship. Indeed, as discussed in the *DTS Letter Order*, CPBI identified concerns of potential interference resulting from the repack that arose after it filed the Stamford Modification Application that resulted in its decision to pursue a DTS application.⁴⁷

16. As explained in the *2008 DTS Order*, a change in reference point is "subject to a station showing that the resulting service area circle fully encompasses the station's authorized service area."⁴⁸ PMCM contends that neither CPBI nor the Division addressed that WEDW's move of the reference point to Stamford would not "encompasses the station's authorized service area" and that over a million people in central and eastern Connecticut would lose WEDW's service.⁴⁹ The record does not support this assertion. To the contrary, the change in reference point would result in a "service area circle [that] fully encompasses" WEDW's "authorized service area," both as such "authorized service area" is reflected in the parameters granted in the *Stamford Modification Grant* and as reflected in the licensed parameters at the Trumbull Tower site.⁵⁰ We thus agree with the Bureau's finding that the proposed DTS deployment would result in no service loss and actually eliminate interference.⁵¹ PMCM mistakenly compares the "authorized service area" as reflected in the *Stamford Modification Grant* to the "authorized service area" from the Trumbull Tower site and argues that the former does not encompass the latter. This is an incorrect comparison for purposes of the *2008 DTS Order*, which requires the "service area circle" using the requested reference point to fully encompass the station's "authorized service area."⁵² As noted above, CPBI complies with this requirement. The purported loss of service PMCM identifies in the AFR

⁴⁴ *DTS Letter Order* at 4-5.

⁴⁵ See AFR at 3 (citing *Construction Period for Broadcast Stations*, Report and Order, 23 FCC 2d 274 (1970) ("[C]onstruction permits for new television stations are granted only to qualified applicants who demonstrate capacity and bona fide intention to construct and render broadcast services in accordance with the Commission's rules, and the Commission in awarding permits relies on the permittee's obligation to proceed with construction and to initiate authorized services promptly and expeditiously.")).

⁴⁶ See *infra* note 54 (noting that the *Stamford Modification Grant* was not challenged and is now final).

⁴⁷ See *supra* note 16.

⁴⁸ *DTS R&O*, 23 FCC Rcd at 16748-49, para. 29.

⁴⁹ AFR at 5.

⁵⁰ See CPBI Response, Exh. B, "WEDW-DT Comparison Licensed vs. Proposed DTS Site 1."

⁵¹ See *DTS Letter Order* at 5.

⁵² *DTS R&O*, 23 FCC Rcd at 16748-49, para. 29.

pertains to the Stamford transmitter relocation⁵³ and is not related to the implementation of DTS transmission here. To the extent that PMCM is challenging CPBI's application to move the transmitter location from the Trumbull Tower to the Stamford Tower, we deny that claim as an untimely impermissible collateral attack on the approval of that relocation granted in the *Stamford Modification Grant*.⁵⁴ PMCM's Engineering Statement itself does not discuss any loss of service resulting from DTS operations. We find that the Engineering Statement is inapposite because the service loss determination was based on a comparison against the reference point in Bridgeport, rather than the Stamford service area.

17. Second, we reject PMCM's arguments regarding the Division's analysis in allowing CPBI to match the service area of the unbuilt WABC-TV construction permit as the largest station in the market. In granting the DTS Application, the Division recognized that WJLP, Middletown Township, NJ, licensed to PMCM—not WABC-TV—was in fact the largest station in the market at the time of grant of the DTS Application.⁵⁵ The Division noted that both of CPBI's DTS sites were located within the 116.4 kilometer DTS arc of WJLP, thus satisfying section 73.622(f)(5) of the rules.⁵⁶ PMCM has not challenged the staff's analysis of WJLP's coverage contour, nor has it questioned that WJLP served this area at the time the Division issued the *DTS Letter Order*.⁵⁷ We agree with the *DTS Letter Order* that WJLP was the largest station in the market at the time of grant of the DTS Application regardless of the status of WABC-TV's permit, and WJLP's authorized service area would cover WEDW's proposed DTS service area.⁵⁸ In affirming the Division's decision, we rely on WJLP's service area as the match for the largest station in market pursuant to section 73.622(f)(5), and we therefore have no need to reach the question of the applicability of WABC-TV's construction permit at the time the DTS Application was filed.

18. Third, we disagree with PMCM that the *DTS Letter Order* creates a misuse of the DTS application process to undermine the Commission's longstanding commitment to community-based service under section 307(b) of the Act. As an initial matter, we find herein that CPBI has acted in accordance with our DTS rules. PMCM's argument that WEDW's implementation of DTS facilities will

⁵³ See Informal Objection at 4 (“Comparing the coverage maps supplied by CPBI in Exhibit B of its application graphically demonstrates the areas of Connecticut which will lose service if the station actually relocates.”).

⁵⁴ No one objected to the Stamford Modification Application nor did anyone seek reconsideration of the Division's grant of the application. The deadline for filing a petition for reconsideration was 30 days after public notice of the grant (in this case, no later than January 2, 2018). 47 U.S.C. § 405(a). See *Amendment of Section 73.622(i), Post Transition Table of DTV Allotments Television Broadcast Stations (Seaford, Delaware)*, Memorandum Opinion and Order, 31 FCC Rcd 9388, 9393, paras. 14-15 (2016).

⁵⁵ *DTS Letter Order* at 6.

⁵⁶ *Id.* (“WJLP's authorized service area of 42,605.5 square kilometers translates to a DTS arc of 116.4 kilometers.”). The *DTS Letter Order* further recognized that “while the Empire State Building contour extends beyond that arc in two areas, those extensions are minimal, which is allowed,” and we affirm the Division's finding. See *id.*; *DTS R&O*, 23 FCC Rcd at 16750, para. 33.

⁵⁷ We reject PMCM's attempt to limit the ability to match a competitor's service area by imposing the contractual limitations that the competitor independently negotiated. See PMCM AFR at n.5 (arguing that WJLP's “coverage area is subject to interference consent agreements with other nearby stations” and thus it is “not [] a true coverage ‘match’ if the matching station did not have to abide by the same impediments as PMCM, which effectively limit PMCM's coverage”). The adopted rules do not impose such restrictions.

⁵⁸ PMCM objects to this alternative justification on the grounds that “CPBI has never sought to match PMCM's authorized coverage area.” PMCM AFR at n.5. We disagree that this is fatal. Nothing in the 2008 *DTS Order* bars the Commission from basing its service area match finding on WJLP's service area at the time of grant. See 47 U.S.C. § 309(a) (“[I]f the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application”) (emphasis added).

lead it to focus more on the larger urban audience of New York City to the detriment of its licensed community is wholly conjectural.⁵⁹ More specifically, PMCM's comparison of the addition of a DTS transmitter site in the present case to WZME's 2008 transmitter relocation request from the Bridgeport area to the Empire State Building, and the Bureau's denial in 2009, is inapposite. As an initial matter, as a Bureau-level decision, it is not binding on the Commission.⁶⁰ In addition, that unsuccessful attempt by WZME to relocate its transmitter more than a decade ago did not include the use of DTS technology, and was rejected, in large part due to the loss of service. Under that relocation proposal, 2.2 million persons would have lost service, whereas no Connecticut viewers will lose service here. Nothing in the record indicates that WEDW will abandon its service obligations to its licensed community, and population density alone is an insufficient basis to deny the benefits of DTS technology. Specifically, we remind all licensees of the seriousness of their obligation to serve their communities of license, and not to divert resources to serve other, larger communities in their service area. As discussed above, the use of DTS technology will not result in a loss of service, and in fact will increase service to viewers in western Connecticut. We find PMCM's request to be an untimely attempt to re-evaluate the *Stamford Modification Grant*, the *DTS R&O*, our channel-sharing decisions, or the Commission's DTS rules. Moreover, we find PMCM's speculation that WZME's owners are somehow dictating CPBI's operating decisions or are otherwise in control of WEDW as unsupported by any record evidence.⁶¹

III. ORDERING CLAUSE

19. **ACCORDINGLY, IT IS ORDERED** that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 CFR § 1.115(g), the Application for Review of PMCM TV LLC, **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁹ See AFR at 8-9.

⁶⁰ See *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

⁶¹ See, e.g., AFR at 9 ("At the same time, the Commission cannot ignore the fact that here the service area of a putatively non-commercial station is being dictated by its commercial sharing partner."); *id.* at 10 (raising the question "as to whether a channel allocated to non-commercial operations is actually being dominated in its most fundamental particulars by its commercial sharee").